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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-1292

THEODORE KOEHLER, Warden,
Marquette Branch Prison,

Petitioner-Appellant,

vs.

ENOCH CHISM,

Respondent-Appellee.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

The Petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on April 19, 1976, and (2) granting the petition. As grounds for this motion, Petitioner states the following:

1. THE VIOLATION BY THE LOWER COURTS OF THE AD HOC BALANCING PRINCIPLE OF BARKER V WINGO, 407 US 514 (1972), THROUGH THE USE OF A PER SE SPECIFIED TIME PERIOD TEST AND THE FAILURE TO PROPERLY CONSIDER THE REASON FOR THE DELAY.

The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the United States District Court for the Western District of Michigan which granted the petition for a writ of habeas corpus. *Chism* v *Koehler*, 392 F Supp 659 (WD Mich, 1975), *aff'd* ..... F2d ..... (CA 6, 1976). That judgment, while paying lip service to the ad hoc balancing principle enunciated in *Barker* v *Wingo*, 407 US 514 (1972), in fact applied a per se specified period of time test in determining that the right to a speedy trial had been violated. Instead of fairly analyzing the four *Barker* factors along with all other relevant circumstances, the court arbitrarily and improperly gave undue weight to the factors of prejudice (this issue is discussed in the petition for a writ of certiorari) and length of delay, and failed to give proper consideration to the reason for the delay. The court incorrectly held that the "inordinate delay on the interlocutory appeal" and the prejudice were "overriding factors" which "*alone* would support a conclusion that the right was denied." (emphasis added) 392 F Supp at 668.

The court determined that "regardless of the reasonableness or unreasonableness" of pre-appeal delay, the "mere passage" of such time made a prompt appellate decision necessary. While admitting that a delay "of at least five or six months must have been expected," the court merely found that the "unjustified delay in the Michigan Court of Appeals was at least eight months." This use of a per se time period is an improper application of the *Barker* v *Wingo* balancing test and fails to give proper consideration to the reasons for the delay of the state trial.

Shortly after his arrest for the mail bomb murder of Mrs. Nola Puyear, Respondent Chism intentionally divested himself of his jointly-held assets in the hope of convincing the trial court that he was eligible for court-appointed counsel. Thus confronted with a novel issue involving potentially far-

reaching consequences for the entire judicial system, the trial court held extensive hearings and then refused to appoint an attorney for Chism at public expense. Because of this unique situation which Chism himself had created, the trial court permitted an interlocutory appeal to the Michigan Court of Appeals which, while resolving the issue in Chism's favor, took an unfortunately long time. There has been no contention that the prosecution was in any way at fault in this delay, and in fact, the government did everything it could to expedite the appeal by stipulating to submission on briefs alone and by stipulating to advancing the case on the Michigan Court of Appeals calendar.

Despite the prosecution's good faith and despite other relevant circumstances such as the heinous nature of the crime and the overwhelming evidence of Chism's guilt, the United States Court of Appeals agreed with the District Court that the Michigan trial court should have presaged the appellate decision which granted Chism's request for appointed counsel. Although this question of self-induced indigency was one of first impression in the state courts in 1967, the 1975 order granting the writ of habeas corpus determined that "the trial court should not have put the petitioner to a pre-trial appeal. . . ." In hindsight it appears that a better course would have been to grant appointed counsel earlier, but to elevate such a retrospective determination to the status of a constitutional mandate is unreasonable.

Administrative delays in criminal trials admittedly must be weighed against the government in determining whether the constitutional right to a speedy trial has been violated, but the courts are virtually unanimous in declaring such delays to be "neutral reasons" which "should be weighed less heavily." *Barker* v *Wingo*, 407 US 514, 531. This is true of the several circuit courts, *see e.g.*, *United States* v *Shepard*, 511 F2d 119 (CA 5, 1975); *United States* v *Jones*, 524 F2d 834

(CA DC, 1975); *United States* v *Baumgarten*, 517 F2d 1020 (CA 8, 1975), *cert den* ..... US .....; 96 S Ct 152; ..... L Ed 2d ..... (1975), and it is also true within the Sixth Circuit, *see e.g., United States* v *LaBorde*, 496 F2d 965 (CA 6, 1974), and *United States* v *Mulligan*, 520 F2d 1327, 1331, 1332 (CA 6, 1975), where it was said that time alone does not require dismissal of an indictment and that "court-created delay" did not abridge that defendant's constitutional right to a speedy trial. These decisions are in clear conflict with the holding in this case, where administrative delay was held to be an "overriding factor" in the decision to grant the writ.

Also in conflict with the instant case is the recent holding in *United States* v *Fairchild*, 526 F2d 185 (CA 7, 1975), *cert den* ..... US ..... (Case No. 75-1033, April 19, 1976). It should be noted that certiorari was denied on the same day in *Fairchild* and in the instant case. In *Fairchild* a twenty-seven month delay between indictment and trial was held not to deprive the defendant of his right to a speedy trial although the only explanation for the delay was that the government desired to find others who were involved in the counterfeiting operation and it wanted to conclude the separate trial of a witness. The *Fairchild* court cited with approval the decision in *United States* v *Ricketson*, 498 F2d 367, 371-372 (CA 7, 1974), where the court *assumed* that the trial judge had sufficient reasons for postponing the trial and held that the defendant had not sustained his burden of showing why those reasons were insufficient.

Most of the cases which discuss the issue of "neutral factors" deal with delays in trial courts such as overcrowded dockets; few cases have considered delays caused by a defendant's interlocutory appeal. However, in *Harrison* v *United States*, 392 US 219, 221, fn 4 (1968), this Court said:

> "4. • • •
>
> "The petitioner's further contention that he was denied the right to a speedy trial is wholly without merit and was properly rejected by the Court of Appeals. See 128 US App DC, 248-250, 387 F2d, at 206-208. • • • Virtually all of the delays of which the petitioner complains occurred in the course of appellate proceedings and resulted either from the actions of the petitioner or from the need to assure careful review of an unusually complex case."

With the ever-increasing caseload in the state trial and appellate courts, it can reasonably be expected that the problem of delay caused by appellate review will recur with greater frequency in coming years. If the *Barker* v *Wingo* balancing test is to be modified so that such appellate delay will be weighed heavily against the government as a per se violation of the right to a speedy trial, let the change come only after careful and complete consideration of the issue by this Court. To allow a single aberrant District Court judgment, as affirmed by a single Circuit Court panel, to arbitrarily impose such a limitation would be too drastic a method of solving such an important problem.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, Petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

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